

AMENDED IN ASSEMBLY AUGUST 21, 2002

AMENDED IN ASSEMBLY AUGUST 8, 2002

AMENDED IN ASSEMBLY JUNE 19, 2002

AMENDED IN SENATE MAY 7, 2002

SENATE BILL

No. 1680

Introduced by Senator Polanco
(Coauthor: Senator Kuehl)
(Coauthor: Assembly Member Goldberg)

February 21, 2002

~~An act to add Section 19.5 to the Penal Code, relating to political expression.~~ *An act to amend Sections 17537.3, 22952, 22956, and 22958 of the Business and Professions Code, and to amend Section 308 of the Penal Code, relating to tobacco products.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1680, as amended, Polanco. ~~Political expression: penalties~~
Tobacco: minimum legal age: display and distribution limitations.

Existing law prohibits the furnishing of tobacco products to, and the purchase of those products by, a person under 18 years of age and makes the violation of these provisions a criminal offense. Existing law also provides for the establishment of programs relating to the prevention of tobacco use.

This bill would change this minimum age requirement to apply to a person under 21 years of age with an exception provided for a person born before January 1, 1985. The bill would require that tobacco use prevention programs be revised to discourage the use of tobacco products by any person under that age. By creating new infractions and

enlarging the scope of an existing crime by changing the minimum age requirement for furnishing and purchasing tobacco products, the bill would impose additional duties on local law enforcement agencies, thus imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

~~Under existing law, unless otherwise specified, a misdemeanor is punishable by imprisonment in a county jail not exceeding 6 months, or by a fine not exceeding \$1,000, or by both that imprisonment and fine.~~

~~This bill would state findings and declarations of the Legislature with respect to the history of nonviolent political expression in the United States. This bill would provide that, except where there are extraordinary aggravating circumstances, as defined, the punishment for the commission of, or for a conspiracy to commit, certain misdemeanor offenses that do not, among other things, threaten to cause physical harm to property or bodily harm to persons or actually cause physical harm to property or bodily harm to persons, shall be a fine not to exceed \$100, imprisonment in a county jail for a period not to exceed 2 days, or both that fine and imprisonment, if the motive for the violation is found to be political expression, as defined. If the court finds that there are extraordinary aggravating circumstances related to the crimes committed, the defendant shall be punishable by the maximum fine and imprisonment specified for a violation of each of those particular misdemeanor offenses.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes. State-mandated local program: ~~no~~ yes.

The people of the State of California do enact as follows:

- 1 ~~SECTION 1. The Legislature hereby finds and declares the~~
- 2 *SECTION 1. The Legislature finds and declares the*
- 3 *following:*
- 4 *(a) Tobacco kills 480,000 Americans every year, causing more*
- 5 *deaths than AIDS, alcohol abuse, illegal drug use, auto accidents,*
- 6 *firearms accidents, fires, homicides, and suicides combined.*

1 ***(b) Youth smoking has been identified as one of the most***
2 ***important health care problems, and beginning to smoke as an***
3 ***adolescent is the most important cause of a lifetime smoking***
4 ***addiction.***

5 ***(c) Three states, Alabama, Alaska, and Utah, have raised the***
6 ***minimum legal age for smoking above that required by California.***

7 ***(d) Increasing the legal minimum sale age for tobacco will***
8 ***reduce the number of older youth who smoke and will help reduce***
9 ***sales of tobacco to younger children.***

10 ***(e) Studies and surveys have shown that when states increased***
11 ***the legal minimum sale age for alcohol, drinking by high school***
12 ***seniors fell by over a third and daily drinking in the same group fell***
13 ***more than 50 percent.***

14 ***(f) According to a United States Surgeon General's report,***
15 ***smokers usually have sampled cigarettes at the median age of 14***
16 ***years but did not begin to smoke daily until the age of 18 years, and***
17 ***a small percentage began smoking after the age of 21 years.***

18 ***(g) According to the American Lung Association,***
19 ***approximately 90 percent of smokers begin smoking before the age***
20 ***of 21 years, and those who begin smoking at an early age are more***
21 ***likely to develop a severe level of addiction to nicotine than those***
22 ***who start at a later age.***

23 ***(h) The legal minimum sale age for alcohol in California is 21***
24 ***years of age and those under 21 have a visibly different driver's***
25 ***license. Raising the legal minimum sale age for tobacco would***
26 ***ease the ability of merchants and vendors to check identification***
27 ***and would establish a uniform age for the purchase of these legal***
28 ***drugs.***

29 ***(i) The state should continue its commitment to vigorous***
30 ***antitobacco education efforts and strict enforcement of existing***
31 ***laws limiting access by youth to these products.***

32 ***(j) It is in the interest of the public health to prevent adolescents***
33 ***from taking up the deadly habit of smoking in order to avert their***
34 ***addiction to nicotine later in life.***

35 ***SEC. 2. Section 17537.3 of the Business and Professions Code***
36 ***is amended to read:***

37 ***17537.3. The following acts are prohibited:***

38 ***(a) For any person to offer as part of an advertising plan or***
39 ***program, promotional offers of smokeless tobacco products***~~***which***~~
40 ***that require proof of purchase of a smokeless tobacco product***

1 unless it carries a designation that the offer is not available to
2 ~~minors~~ *a person under 21 years of age*. Each promotional offer
3 shall include in any mail-in coupon a statement requesting
4 purchasers to verify that the purchaser is ~~18~~ *21* years of age or
5 older.

6 (b) For any person to honor mail-in and telephone requests for
7 promotional offers of smokeless tobacco products unless
8 appropriate efforts are made to ascertain that a purchaser is over
9 ~~18~~ *21* years of age. For purposes of this subdivision, appropriate
10 efforts to ascertain the age of a purchaser includes, but is not
11 limited to, requests for a purchaser's birth date.

12 (c) For any person by any means, as part of an advertising plan
13 or program, to distribute free samples of smokeless tobacco
14 products within a two block radius of any premises or facilities
15 whose primary purpose is directed toward persons under the age
16 of ~~18~~ *21* years including, but not limited to, schools, clubhouses,
17 and youth centers, when those premises are being used for their
18 primary purposes.

19 (d) For any person to distribute, as part of any advertising plan
20 or program, unsolicited samples of smokeless tobacco products
21 through a mail campaign.

22 (e) *The provisions of this section shall not prohibit promotional*
23 *offers of smokeless tobacco products, the honoring of those*
24 *promotional offers, or the distribution of samples, to any person*
25 *who was born before January 1, 1985.*

26 SEC. 3. *Section 22952 of the Business and Professions Code*
27 *is amended to read:*

28 ~~22952. On or before July 1, 1995, the~~ *The State Department*
29 *of Health Services shall do all of the following:*

30 (a) Establish and develop a program to reduce the availability
31 of tobacco products to persons under ~~18~~ *21* years of age through
32 the enforcement activities authorized by this division.

33 (b) Establish requirements that retailers of tobacco products
34 post conspicuously, at each point of purchase, a notice stating that
35 selling tobacco products to anyone under ~~18~~ *21* years of age is
36 illegal and subject to penalties *unless otherwise specified by law*.
37 The notice shall also state that the law requires that all persons
38 selling tobacco products check the identification of any purchaser
39 of tobacco products who reasonably appears to be under ~~18~~ *21*
40 years of age. The warning signs shall include a toll-free telephone

number to the state department for persons to report unlawful sales of tobacco products to ~~minors~~ *a person under 21 years of age who was not born before January 1, 1985.*

(c) Provide that *the* primary responsibility for enforcement of this division shall be with the state department. In carrying out its enforcement responsibilities, the state department shall conduct random, onsite sting inspections at retail sites and ~~shall~~ *may* enlist the assistance of persons that are 15 ~~and~~, 16, 17, 18, 19, or 20 years of age in conducting these enforcement activities. The state department may conduct onsite sting inspections in response to public complaints or at retail sites where violations have previously occurred, and investigate illegal sales of tobacco products to ~~minors~~ *a person under 21 years of age* by telephone, mail, or the Internet. Participation in these enforcement activities by a person under ~~18~~ 21 years of age shall not constitute a violation of subdivision (b) of Section 308 of the Penal Code for the person under ~~18~~ 21 years of age, and the person under ~~18~~ 21 years of age is immune from prosecution thereunder, or under any other provision of law prohibiting the purchase of these products by a person under ~~18~~ 21 years of age.

(d) In accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the state department shall adopt and publish guidelines for the use of persons under ~~18~~ 21 years of age in inspections conducted pursuant to subdivision (c) that shall include, but not be limited to, all of the following:

(1) The state department and any local law enforcement agency under an enforcement delegation contract with the department may use persons under ~~18~~ 21 years of age who are ~~15~~ 18 or ~~16~~ 19 years of age in random inspections to determine if sales of cigarettes or other tobacco products are being made to persons under ~~18~~ 21 years of age.

(2) A photograph or video recording of the person under ~~18~~ 21 years of age shall be taken prior to each inspection or shift of inspections and retained by the department or the local law enforcement agency under an enforcement delegation contract with the department for purposes of verifying appearances.

(3) The state department or a local law enforcement agency under an enforcement delegation contract with the department

1 may use video recording equipment when conducting the
2 inspections to record and document illegal sales or attempted sales.

3 (4) The person under ~~18~~ 21 years of age, if questioned about his
4 or her age, need not state his or her actual age but shall present a
5 true and correct identification if verbally asked to present it. Any
6 failure on the part of the person under ~~18~~ 21 years of age to provide
7 true and correct identification, if verbally asked for it, shall be a
8 defense to any action pursuant to this section.

9 (5) The person under ~~18~~ 21 years of age shall be under the
10 supervision of a regularly employed peace officer during the
11 inspection.

12 (6) All persons under ~~18~~ 21 years of age used in this manner by
13 the department or a local law enforcement agency under an
14 enforcement delegation contract with the department shall display
15 the appearance of a person under ~~18~~ 21 years of age. It shall be a
16 defense to any action under this division that the person's
17 appearance was not that which could be generally expected of a
18 person under ~~18~~ 21 years of age, under the actual circumstances
19 presented to the seller of the cigarettes or other tobacco products
20 at the time of the alleged offense.

21 (7) Following the completion of the sale, the peace officer
22 accompanying the person under ~~18~~ 21 years of age shall reenter the
23 retail establishment and inform the seller of the random inspection
24 and following an attempted sale, the department shall notify the
25 retail establishment of the inspection.

26 (8) Failure to comply with the procedures set forth in this
27 subdivision shall be a defense to any action brought pursuant to
28 this section.

29 (e) Be responsible for ensuring and reporting the state's
30 compliance with Section 1926 of Title XIX of the federal Public
31 Health Service Act (42 U.S.C. 300x-26) and any implementing
32 regulations adopted in relation thereto by the United States
33 Department of Health and Human Services. A copy of this report
34 shall be made available to the Governor and the Legislature.

35 (f) Provide that any civil penalties imposed pursuant to Section
36 22958 shall be enforced against the owner or owners of the retail
37 business and not the employees of the business.

38 *SEC. 4. Section 22956 of the Business and Professions Code*
39 *is amended to read:*

22956. All persons engaging in the retail sale of tobacco products shall check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under ~~18~~ 21 years of age.

SEC. 5. Section 22958 of the Business and Professions Code is amended to read:

22958. (a) The state department may assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under ~~the age of 18 years~~ 21 years of age other than for a person born before January 1, 1985, any tobacco, cigarette, or cigarette papers, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, according to the following schedule: (1) a civil penalty of from two hundred dollars (\$200) to three hundred dollars (\$300) for the first violation, (2) a civil penalty of from six hundred dollars (\$600) to nine hundred dollars (\$900) for the second violation within a five-year period, (3) a civil penalty of from one thousand two hundred dollars (\$1,200) to one thousand eight hundred dollars (\$1,800) for a third violation within a five-year period, (4) a civil penalty of from three thousand dollars (\$3,000) to four thousand dollars (\$4,000) for a fourth violation within a five-year period, or (5) a civil penalty of from five thousand dollars (\$5,000) to six thousand dollars (\$6,000) for a fifth or subsequent violation within a five-year period.

(b) The state department shall assess penalties in accordance with the schedule set forth in subdivision (a) against any person, firm, or corporation that sells, offers for sale, or distributes tobacco products from a cigarette or tobacco products vending machine, or any person, firm, or corporation that leases, furnishes, or services these machines in violation of Section 22960.

(c) The state department shall assess penalties in accordance with the schedule set forth in subdivision (a) against any person, firm, or corporation that advertises or causes to be advertised any tobacco product on any outdoor billboard in violation of Section 22961.

(d) If a civil penalty has been assessed pursuant to this section against any person, firm, or corporation for a single, specific violation of this division, the person, firm, or corporation shall not be prosecuted under Section 308 of the Penal Code for a violation

1 based on the same facts or specific incident for which the civil
2 penalty was assessed. If any person, firm, or corporation has been
3 prosecuted for a single, specific violation of Section 308 of the
4 Penal Code, the person, firm, or corporation shall not be assessed
5 a civil penalty under this section based on the same facts or specific
6 incident upon which the prosecution under Section 308 of the
7 Penal Code was based.

8 (e) (1) In the case of a corporation or business with more than
9 one retail location, to determine the number of accumulated
10 violations for purposes of the penalty schedule set forth in
11 subdivision (a), violations of this division by one retail location
12 shall not be accumulated against other retail locations of that same
13 corporation or business.

14 (2) In the case of a retail location that operates pursuant to a
15 franchise as defined in Section 20001, violations of this division
16 accumulated and assessed against a prior owner of a single
17 franchise location shall not be accumulated against a new owner
18 of the same single franchise location for purposes of the penalty
19 schedule set forth in subdivision (a).

20 (f) Proceedings under this section shall be conducted in
21 accordance with Section 100171 of the Health and Safety Code.

22 *SEC. 6. Section 308 of the Penal Code is amended to read:*

23 308. (a) Every person, firm, or corporation—~~which that~~
24 knowingly or under circumstances in which it has knowledge, or
25 should otherwise have grounds for knowledge, sells, gives, or in
26 any way furnishes to another person who is under ~~the age of 18~~
27 ~~years~~ 21 years or age other than a person born before January 1,
28 1985, any tobacco, cigarette, or cigarette papers, or any other
29 preparation of tobacco, or any other instrument or paraphernalia
30 that is designed for the smoking or ingestion of tobacco, products
31 prepared from tobacco, or any controlled substance, is subject to
32 either a criminal action for a misdemeanor or to a civil action
33 brought by a city attorney, a county counsel, or a district attorney,
34 punishable by a fine of two hundred dollars (\$200) for the first
35 offense, five hundred dollars (\$500) for the second offense, and
36 one thousand dollars (\$1,000) for the third offense.

37 Notwithstanding Section 1464 or any other provision of law, 25
38 percent of each civil and criminal penalty collected pursuant to this
39 subdivision shall be paid to the office of the city attorney, county
40 counsel, or district attorney, whoever is responsible for bringing

the successful action, and 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the city or county for the administration and cost of the community service work component provided in subdivision (b).

Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence of majority shall be defense to any action brought pursuant to this subdivision. Evidence of majority of a person is a facsimile of or a reasonable likeness of a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the Armed Forces *indicating the person is 21 years or age or older or was born before January 1, 1985.*

For purposes of this section, the person liable for selling or furnishing tobacco products to ~~minors~~ *a person under 21 years or age or a person born on or after January 1, 1985*, by a tobacco vending machine shall be the person authorizing the installation or placement of the tobacco vending machine upon premises he or she manages or otherwise controls and under circumstances in which he or she has knowledge, or should otherwise have grounds for knowledge, that the tobacco vending machine will be utilized by ~~minors~~ *a person under 21 years or age or a person born on or after January 1, 1985.*

(b) Every person ~~under the age of 18 years~~ *21 years or age other than a person born before January 1, 1985*, who purchases, receives, or possesses any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of seventy-five dollars (\$75) or 30 hours of community service work.

(c) Every person, firm, or corporation ~~which~~ *that* sells, or deals in tobacco or any preparation thereof, shall post conspicuously and keep so posted in his, her, or their place of business at each point of purchase the notice required pursuant to subdivision (b) of Section 22952 of the Business and Professions Code, and any person failing to do so shall upon conviction be punished by a fine of ten dollars (\$10) for the first offense and fifty dollars (\$50) for

1 each succeeding violation of this provision, or by imprisonment
2 for not more than 30 days.

3 (d) For purposes of determining the liability of persons, firms,
4 or corporations controlling franchises or business operations in
5 multiple locations for the second and subsequent violations of this
6 section, each individual franchise or business location shall be
7 deemed a separate entity.

8 (e) It is the Legislature's intent to regulate the subject matter of
9 this section. As a result, no city, county, or city and county shall
10 adopt any ordinance or regulation inconsistent with this section.

11 (f) Notwithstanding any other provision of this section, the
12 Director of Corrections may sell or supply tobacco and tobacco
13 products, including cigarettes and cigarette papers, to any person
14 confined in any institution or facility under his or her jurisdiction
15 who has attained the age of 16 years, if the parent or guardian of
16 the person consents thereto, and may permit smoking by the person
17 in any institution or facility. No officer or employee of the
18 Department of Corrections shall be considered to have violated
19 this section by any act authorized by this subdivision.

20 *SEC. 7. No reimbursement is required by this act pursuant to*
21 *Section 6 of Article XIII B of the California Constitution because*
22 *the only costs that may be incurred by a local agency or school*
23 *district will be incurred because this act creates a new crime or*
24 *infraction, eliminates a crime or infraction, or changes the penalty*
25 *for a crime or infraction, within the meaning of Section 17556 of*
26 *the Government Code, or changes the definition of a crime within*
27 *the meaning of Section 6 of Article XIII B of the California*
28 *Constitution.*

29 ~~following:~~

30 ~~(a) Political free speech, the ability to express dissenting~~
31 ~~political viewpoints, is essential for an authentically free society~~
32 ~~and is, in fact, one of the features that makes the United States of~~
33 ~~America and the State of California truly great. Indeed, the United~~
34 ~~States of America was born through dissent and has, since then,~~
35 ~~had a long, honorable history of individuals engaged in political~~
36 ~~expression in order to create a more just society. From time to time,~~
37 ~~dissenters have expressed their political views through peaceful,~~
38 ~~nonviolent action, which may have broken existing laws, in order~~
39 ~~to call attention to an unjust condition or law. Among them, Henry~~
40 ~~David Thoreau, Margaret Sanger, Martin Luther King, Jr., Cesar~~

Chavez, the labor movement, the civil rights movement, and the women's movement all facilitated the creation of a greater society through peaceful protest and nonviolent civil disobedience.

(b) As an incentive for peaceful protesters to reject violence and accept personal responsibility for peacefully engaging in trespass, unlawful assembly, failure to disburse, and other infractions or misdemeanors, authorities have generally refrained from imposing lengthy jail sentences or excessive fines. Harsh punishments for these peaceful demonstrations are unwarranted and counterproductive, and may create a dangerous apathy which could manifest itself in violence. Imposition of modest fines and minor jail sentences recognizes that persons motivated by the desire to express political views are far less of a threat to the public than common criminals and that despite their violation of specific laws, those who engage in peaceful, nonviolent civil disobedience as a means of political expression are serving the worthy purposes of exposing injustice and seeking to improve society.

SEC. 2. Section 19.5 is added to the Penal Code, to read:

19.5. (a) Notwithstanding any other provision of law, any conviction of a misdemeanor offense proscribed by paragraph (1) of subdivision (a) of Section 148, Section 372, 408, or 409, paragraph (2) or (3) of Section 415, or Section 416, or any conviction for conspiracy to commit any of these offenses in violation of Section 182 for which the motive is found to be political expression and that does not threaten to cause physical harm to property or bodily harm to persons or actually cause physical harm to property or bodily harm to persons, does not trespass on any residential property, and does not threaten to interfere or actually interfere with the provision of services by any health care provider or attendance of religious services, is punishable by a fine not to exceed one hundred dollars (\$100), imprisonment in a county jail for a period not to exceed two days, or by both that fine and imprisonment.

(b) Upon the request of the defendant, the court shall determine whether the violation for which the defendant has been convicted falls within the terms of this section. This issue may be determined by declarations, affidavits, or other relevant and reliable information submitted by the parties.

(c) (1) The punishment of a defendant fitting the description in subdivision (a) shall not exceed the punishment provided in that

1 ~~subdivision unless the court finds that there are extraordinary~~
2 ~~aggravating circumstances related to the crimes committed.~~

3 ~~(2) For the purposes of this section, “extraordinary~~
4 ~~aggravating circumstances” shall be deemed to exist if the~~
5 ~~defendant’s unlawful act or acts were the proximate cause of~~
6 ~~substantial violence, substantial bodily harm, or substantial~~
7 ~~property damage and the acts were committed when the defendant~~
8 ~~reasonably understood that the unlawful act or acts would result in~~
9 ~~that violence, harm, or damage.~~

10 ~~(d) If the sentencing judge finds that the defendant’s unlawful~~
11 ~~act or acts were motivated by political expression but finds that~~
12 ~~there were extraordinary aggravating factors related to the~~
13 ~~unlawful act or acts, the judge must so state, in writing and on the~~
14 ~~record, those extraordinary aggravating circumstances and the~~
15 ~~specific reasons for the finding.~~

16 ~~(e) Nothing in this section shall preclude punishment for those~~
17 ~~crimes not included in this section, instead, under any other~~
18 ~~applicable provision of law.~~

19 ~~(f) “Political expression” means any oral or written statements~~
20 ~~or nonviolent symbolic actions made for the purpose of~~
21 ~~influencing public opinion on matters of general interest to society,~~
22 ~~including, but not limited to, the enactment or repeal of laws, the~~
23 ~~election or removal from office of public officials, or the support~~
24 ~~of or opposition to court decisions or other public policy matters.~~

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